United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

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Court of Appeals, District of Columbia

APRIL TERM, 1908.

No. 1878.

LUCIEN D. WINSTON, APPELLANT,

vs.

THE ARLINGTON FIRE INSURANCE COMPANY FOR THE DISTRICT OF COLUMBIA.

APPEAL FROM THE SUPREME COURT OF THE DISTRICT OF COLUMBIA

FILED MARCH 17, 1908.

COURT OF APPEALS OF THE DISTRICT OF COLUMBIA

APRIL TERM, 1908.

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LUCIEN D. WINSTON, APPELLANT,

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THE ARLINGTON FIRE INSURANCE COMPANY FOR THE DISTRICT OF COLUMBIA.

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., MARCH 30, 1908.

In the Court of Appeals of the District of Columbia.

No. 1878.

LUCIEN D. WINSTON, Appellant,
vs.
THE ARLINGTON FIRE INSURANCE COMPANY FOR THE DISTRICT OF COLUMBIA.

a Supreme Court of the District of Columbia.

At Law. No. 50035.

LUCIEN D. WINSTON, Plaintiff,
vs.
THE ARLINGTON FIRE INSURANCE COMPANY FOR THE DISTRICT OF COLUMBIA, Defendant.

UNITED STATES OF AMERICA, *District of Columbia, ss:*

Be It Remembered, That in the Supreme Court of the District of Columbia, at the City of Washington, in said District, at the times hereinafter mentioned, the following papers were filed and proceedings had in the above entitled cause, to wit:—

1 *Declaration.*

Filed December 12, 1907.

In the Supreme Court of the District of Columbia.

At Law. No. 50035.

LUCIEN D. WINSTON
vs.
THE ARLINGTON FIRE INSURANCE COMPANY FOR THE DISTRICT OF COLUMBIA.

1. The plaintiff sues the defendant for money payable by the defendant to the plaintiff for that heretofore, to wit, on June 8th, 1901, and for some time prior thereto, the plaintiff then was, has since been and is now the owner of the three-story brick warehouse, situate on the northeast corner of 11th and B Streets, Northwest, in the city of Washington, District of Columbia, sometimes called corner 11th and "Little" B Streets; that on or about the 8th day of

June, 1901, the upper portion of said building and the roof thereof were damaged by fire; that at the time of the occurrence of said fire and the damage to said premises by reason thereof said premises were insured in the defendant company against all direct loss or damage by fire in the name of the plaintiff as owner of said premises; that under the terms of the contract of insurance then existing between the defendant and the plaintiff, the defendant had the right, in discharge of its liability under said contract of insurance, to pay to the plaintiff the amount of the ascertained loss or damage to said premises by reason of said fire, or at its option to repair, re-
2 build or replace the property so lost or damaged with other of like kind and quality within a reasonable time; that after said fire the defendant, in pursuance of the terms of said contract or policy of insurance and in consideration thereof, elected and undertook, promised and agreed to repair, rebuild and replace the said plaintiff's brick warehouse and premises aforesaid, and in this connection to replace and reconstruct the metal-roof thereof so destroyed and damaged by said fire; thereupon it became and was the obligation and duty of said defendant company to repair, rebuild or replace the said property so damaged by said fire, and the metal roof thereof, with other of like kind and quality, but the said defendant, disregarding its said obligation, duty and promise and undertaking in the premises, failed to repair, rebuild or replace the said property so damaged as aforesaid, with other of like kind and quality, but on the contrary replaced and reconstructed the said metal roof, damaged and destroyed by fire as aforesaid, with material, metal or tin of unlike, insufficient and inferior quality and kind, by reason whereof the said metal roof of said premises thereafter became in need of repairs, and continued to become more and more defective and insufficient until finally, to wit, on or about the 1st day of April, 1907, it became imperative, in order to render said building habitable and tenantable, to put an entirely new roof on said premises; that notwithstanding that the defendant was requested so to do, it refused, failed and neglected to restore or replace said roof, rendering it necessary for the plaintiff to do so at a
3 cost of, to wit, the sum of $382.50; wherefore the plaintiff hath sustained damage to the amount of Five Hundred Dollars, and therefore brings this suit.

2. The plaintiff further sues the defendant for other money payable by the defendant to the plaintiff—for that heretofore, to wit, on the 8th day of June, 1901, the plaintiff was and has since been and is now the owner of the three-story brick warehouse, located on the Northeast corner of 11th and "Little" B Streets, Northwest, in the city of Washington, District of Columbia; that on or about said 8th day of June, 1901, the upper portion of said building and the metal roof thereof were damaged and destroyed by fire without fault on the part of the plaintiff; that at the time of said fire, to wit, on the day and year aforesaid said building was insured under a certain contract or policy of insurance issued by the defendant for value received, to the plaintiff, whereby and in consideration whereof, the said defendant insured the plaintiff against all direct loss and dam-

age by fire (except as otherwise provided in said policy), to said building; that under the terms of said contract or policy of insurance so as aforesaid then existing between the plaintiff and defendant, the defendant had the right in discharge of its liability thereunder to the plaintiff, by reason of said fire, to pay to the plaintiff the amount of the ascertained damage or loss to said building by reason of said fire, or at its option the right to repair, rebuild or replace the property so lost or damaged, with other of like kind and quality, within a reasonable time thereafter; that after said
4 fire the defendant elected to exercise its right to repair, rebuild or replace the property so lost and damaged, and thereupon the defendant under its said contract or policy of insurance became obligated to repair, rebuild and replace the plaintiff's said building and the metal roof thereof, so lost and damaged by fire as aforesaid, within a reasonable time thereafter, with other of like kind and quality; and the defendant then and there, in consideration of the premises and its obligation aforesaid, undertook and then and there faithfully promised the said plaintiff to repair, rebuild, replace and restore the said building and the metal roof thereof, with other of like kind and quality, and to perform said work with good and proper materials, and in a sound, substantial and workmanlike manner, according to the true intent and meaning of its said obligation, undertaking, promise and agreement; and although the said defendant repaired, rebuilt and replaced the said building and the metal roof thereof for the plaintiff, yet the said defendant, not regarding its aforesaid obligation, undertaking and promise, did not repair, rebuild and replace the said building, and the metal roof thereof, for the said plaintiff with others of like kind and quality, with good and proper materials, and in a sound, substantial and workmanlike manner, but wholly neglected and refused so to do, and on the contrary the said defendant replaced and restored the metal roof on said building with material of unlike kind and quality, and with bad, improper, insufficient and defective tin, iron or other material, contrary to the true intent and meaning of its obligation, undertaking, promise and agreement aforesaid; by reason whereof the plaintiff hath been forced and
5 obliged to lay out and expend divers sums of money in and about repairing, replacing and restoring said metal roof, and also in and about removing and replacing said defective, insufficient and worthless roof by a new and proper one, in the whole amounting to the sum of, to wit, Five Hundred Dollars; wherefore the plaintiff hath sustained damage in the sum of Five Hundred Dollars and therefore brings this suit.

D. S. MACKALL,
Attorney for Plaintiff.

The defendant is to plead hereto on or before the twentieth day, exclusive of Sundays and legal holidays, occurring after the day of the service hereof; otherwise judgment.

D. S. MACKALL,
Attorney for Plaintiff.

6 *Defendant's Pleas.*

Filed January 2, 1908.

In the Supreme Court of the District of Columbia.

No. 50035. At Law.

LUCIEN D. WINSTON, Plaintiff,

vs.

THE ARLINGTON FIRE INSURANCE COMPANY FOR THE DISTRICT OF COLUMBIA, Defendant.

1. The defendant, for plea to the plaintiff's declaration, says, that this defendant never undertook and promised in manner and form as the plaintiff hath alleged in said declaration.

2. And for a further plea to said declaration by leave of the court first had and obtained this defendant says that the plaintiff's cause of action, if any he have, did not accrue within three years from the bringing of this suit.

3. And for a further plea to said declaration by leave of the court first had and obtained this defendant says that by the terms of the contract of insurance in said declaration alleged, the plaintiff stipulated and agreed with the defendant, for and in consideration of the making of said contract of insurance by the defendant that no suit or action on said contract of insurance for the recovery of any claim shall be sustainable in any court of law or equity, unless
7 commenced within twelve months next after the fire doing damage to the property insured, and this defendant says, that the plaintiff did not bring this action within twelve months next after said fire, nor until, to wit, more than six years next after said fire, by reason whereof this defendant says the plaintiff is now barred and forever estopped from maintaining this action, or any action, against this defendant.

W. G. JOHNSON,
Attorney for Defendant.

Joinder of Issue.

Filed January 16, 1908.

In the Supreme Court of the District of Columbia.

Law. No. 50035.

LUCIEN D. WINSTON

vs.

ARLINGTON FIRE INSURANCE COMPANY.

The Plaintiff joins issue upon the defendant's first and second pleas.

D. S. MACKALL,
Attorney for Plaintiff.

Notice of Trial.

Take notice that the issue joined in this cause will be tried
8 at the next term of this Court.

D. S. MACKALL,
Attorney for Plaintiff.

Note of Issue.

Law. No. 50035.

LUCIEN D. WINSTON
vs.
ARLINGTON FIRE INSURANCE COMPANY.

Last pleading filed January 16, 1908.

D. S. MACKALL,
Attorney for Plaintiff.

Demurrer to Defendant's Third Plea.

Filed January 16, 1908.

In the Supreme Court of the District of Columbia.

Law. No. 50035.

LUCIEN D. WINSTON
vs.
ARLINGTON FIRE INSURANCE COMPANY.

The plaintiff says that the defendant's third plea to plaintiff's declaration is bad in substance.

D. S. MACKALL,
Attorney for Plaintiff.

9 *Points of Law.*

The limitation contained in the alleged policy of insurance cannot be pleaded to an action not based on the policy.

Supreme Court of the District of Columbia.

WEDNESDAY, *February 5th,* 1908.

Session resumed pursuant to adjournment, Hon. Thos. H. Anderson, Justice presiding.

* * * * * * *

No. 50035. At Law.

LUCIEN D. WINSTON, Plaintiff,
vs.
THE ARLINGTON FIRE INSURANCE COMPANY, Defendant.

Upon consideration of the demurrer filed herein to defendant's third plea, it is ordered that said demurrer be and is hereby overruled.

FRIDAY, *February* 21*st*, 1908.

Session resumed pursuant to adjournment, Hon. Thos. H. Anderson, Justice presiding.

* * * * * * *

10 No. 50035. At Law.

LUCIEN D. WINSTON, Plaintiff,
vs.
THE ARLINGTON FIRE INSURANCE COMPANY FOR THE DISTRICT OF COLUMBIA, Defendant.

Comes now the plaintiff herein by his attorney, Mr. D. S. Mackall, and in open court elects to stand upon his demurrer to defendant's third plea herein, heretofore overruled; whereupon it is considered and adjudged, that the plaintiff herein take nothing by this action, that the defendant go hereof without day, be for nothing held, and recover of plaintiff its costs of defense to be taxed by the Clerk, and have execution thereof.

From the aforegoing, the plaintiff by his attorney in open court, notes an appeal to the Court of Appeals, and the penalty of a bond for costs thereon, is hereby fixed at One Hundred ($100.00) Dollars.

Memorandum.

March 3, 1908.—Appeal bond approved and filed.

11 Supreme Court of the District of Columbia.

UNITED STATES OF AMERICA, *District of Columbia, ss:*

I, John R. Young, Clerk of the Supreme Court of the District of Columbia, hereby certify the foregoing pages numbered from 1 to 10, both inclusive, to be a true and correct transcript of the record according to Rule Five (5) of the Court of Appeals of the District of Columbia, in cause No. 50035, At Law, wherein Lucien D. Winston is Plaintiff, and The Arlington Fire Insurance Company for the District of Columbia is Defendant, as the same remains upon the files and of record in said Court.

In Testimony Whereof, I hereunto subscribe my name and affix the seal of said Court, at the City of Washington, in said District, this 11th day of March, A. D. 1908.

[Seal Supreme Court of the District of Columbia.]

JOHN R. YOUNG, *Clerk.*

Endorsed on cover: District of Columbia supreme court. No. 1878. Lucien D. Winston, appellant, *vs.* The Arlington Fire Insurance Company for the District of Columbia. Court of Appeals, District of Columbia, filed March 17, 1908. Henry W. Hodges, clerk.

In the Court of Appeals

OF THE DISTRICT OF COLUMBIA.

APRIL TERM, 1908.

No. 1878.

LUCIEN D. WINSTON, APPELLANT,

vs.

THE ARLINGTON FIRE INSURANCE COMPANY FOR THE DISTRICT OF COLUMBIA, APPELLEE.

BRIEF FOR APPELLANT.

D. S. MACKALL,
Attorney for Appellant.

THE LAW REPORTER PRINTING CO., WASHINGTON, D. C.

In the Court of Appeals

OF THE DISTRICT OF COLUMBIA.

APRIL TERM, 1908.

No. 1878.

LUCIEN D. WINSTON, APPELLANT,

vs.

THE ARLINGTON FIRE INSURANCE COMPANY FOR THE DISTRICT OF COLUMBIA, APPELLEE.

BRIEF FOR APPELLANT.

Statement of the Case.

This is an action instituted by the appellant against the Arlington Fire Insurance Company, in the Supreme Court of the District, to recover damages alleged to have been sustained by the plaintiff by reason of the failure of the defendant, after electing and undertaking to do so, to properly perform its undertaking, promise, and agreement to repair, rebuild, and replace that portion of a certain building owned by the plaintiff which had been damaged and destroyed by fire. The declaration avers that on June 8, 1901, the plaintiff's building was partially destroyed by fire; that at the time of the occurrence of the fire it was insured against all direct loss or damage by fire under a policy issued by the defendant company. Under the contract of insurance the defendant company

had the option either to pay the amount of the ascertained loss or damage or to repair, rebuild, or replace the property so lost or damaged with other of like kind and quality *within a reasonable time.* The defendant elected and undertook to discharge its liability under the policy by repairing and rebuilding as aforesaid, and thereby became obligated and promised and agreed to repair, rebuild, etc.

Then follows the averments of failure to properly perform and the resulting damages.

The defendant filed three pleas:

(1) Non assumpsit (2), that the cause of action did not accrue within three years from the filing of the suit, and (3) that under said policy of insurance it was stipulated that *no suit or action on said contract of insurance for the recovery of any claim shall be sustainable in any court of law or equity, unless commenced within twelve months next after the fire doing damage to the property insured.*

The plaintiff joined issue on the first and second pleas and demurred to the third. The demurrer was overruled, and the plaintiff electing to stand on his demurrer, judgment was rendered for the defendant.

Assignment of Error.

The court erred in overruling the plaintiff's demurrer to the third plea and entering judgment for the defendant.

ARGUMENT.

The record presents the single question as to whether the plaintiff's cause of action is barred because more than twelve months elapsed between the date of the fire and the commencement of this suit. In other words whether this special stipulation that *no action on the contract of insurance* shall be sustainable unless com-

menced within twelve months after the fire, inserted in the policy, can be pleaded in bar of a suit *not on the policy*, but for damages for failure of the company to perform an undertaking entered upon by it in discharge of its liability under the policy, namely the reconstruction of the property damaged or destroyed by fire.

This provision is contained in nearly all fire insurance policies for the purpose of requiring the policyholder, when his claim is disputed, to bring his suit with more promptness than would otherwise be required, to the end that there may be a more speedy determination as to the liability of the company under its policy. To this extent they have been sustained generally by the courts. But in cases where the liability of the Company under the policy is conceded, and there is no dispute as to the amount, or the amount has been agreed upon or finally ascertained in some proper manner, then the very purpose and object of such provisions are accomplished, and it has been held by the courts in such cases even in *suits on the policy* that this special limitation can not be relied upon to defeat the enforcement of the company's liability so agreed upon or ascertained. There is still less reason for applying this special limitation where the liability is conceded and the company elects to, and undertakes to, rebuild within a *reasonable time.* Manifestly no cause of action accrues to the plaintiff until the company has had a reasonable time to perform. In one case a reasonable time might be a month, while in another it might be more than twelve months; if the latter the insured is deprived of all opportunity to bring an action if the stipulation relied on is applied in such a case.

While it may be entirely reasonable and proper to sustain such a limitation to the extent of requiring the insured, in case his claim is disputed, to institute his suit within a specified time if he intends to litigate, it

may on the other hand be entirely unreasonable to require him to institute a suit where the company has conceded and agreed to discharge its liability, and has, as in this case, actually undertaken to do so. Here the defendant not only conceded its liability, but undertook to discharge it in a manner which necessarily involved time—an indefinite time, limited only by what might be held reasonable under the circumstances of each case. And, finally, it seems to be pretty generally settled that an undertaking to rebuild puts the company in precisely the same position as though it had entered into a new and independent contract with the insured to do the particular work of repair or construction. The company is precisely in the same position as though it had agreed to discharge its liability by instalments. The failure to meet any one of which would give the insured a cause of action accruing as of the date of such failure.

> "While a stipulation of this kind is usually held to be valid in a suit *on the policy*, provided it is not unreasonable, and does not result in depriving the insured of full opportunity to maintain his cause of action, it may be waived like any other provision of the policy."
>
> 19 Cyc., pp. 905, 906.
>
> "After an insurance company has elected to restore or repair the insured property its liability is for breach of the obligation to restore or repair, and not under the obligation to pay the insurance, and the rights and remedies of the ininsured are governed accordingly."
>
> 19 Cyc., p. 890.

If the company elect to repair, all provisions of the policy relating to payment, etc., become inoperative.

> Wynkoop *vs.* Niagara Fire Insurance Co., 91 N. Y., 478.
>
> May on Ins., vol. 2 (4th ed.), secs. 433, 433A.

In Hartford Fire Ins. Co. *vs.* Peebles Hotel Co., 82 Fed. Rep., p. 546, the suit was to recover damages against several insurance companies, resulting from their failure to employ suitable workmen, materials, etc., in repairing plaintiff's building, which had been damaged by fire, and which the defendants, under the usual option given them in the policies of insurance, had elected to repair or rebuild and had undertaken to do.

The point was raised that in view of the apportionment clauses contained in each policy, the plaintiff must sue each company singly. After quoting this apportionment clause, the court says:

> "Clearly this has no bearing upon the liability of the company when sued for a breach of its contract to repair or rebuild, and a plaintiff would be entitled to the full amount of his damages against such company, leaving it to seek contribution from any other company having insurance on the same property. . . . Whether we regard an election to rebuild as a substitution of one contract for another, or as but another mode of paying the loss which has occurred, is immaterial, for upon such an election the contract becomes one for rebuilding or repairing, and is governed by the principles applicable to engagements of that kind where the consideration has been paid in advance. After such an election no action will lie on the policy to recover the money indemnity therein stipulated. For a total failure to repair or rebuild, or where the repairing or rebuilding does not result in restoration of the building to a condition substantially like that existing before the fire, the action is for a breach of the contract to repair or rebuild, and the measure of damages, &c. . . . When once resorted to the whole character of the contract is changed. The election is not to repair or rebuild a proportion of the building, but to repair or rebuild absolutely, so that the insured shall be

> indemnified in full. From this it must follow that the liability for a breach of the contract to repair or rebuild must be equally unlimited."

In Beals Exr. *vs.* The Home Ins. Co., 36 N. Y., 522., the company elected to rebuild, but the insured refused to permit it to do so, and himself reconstructed the building, and attempted to hold the company on the policy to recover the loss.

By the court:

> "Applying to the present case the reasoning there put forth [33 N. Y., 42] we have this result: That after the giving of the notice by the defendants that they would avail themselves of their rights under the tenth condition of the policy, they ceased to be insurers and their liability was no longer measured by the policy, but they became parties to a contract, by which they agree to erect for the plaintiff a building substantially like that destroyed, and for which the consideration had been paid to them in advance."

It was accordingly held that the plaintiff could not recover on the policy.

Heilmann *vs.* Insurance Co., 75 N. Y., p. 7. This was an action by insured for damages for failure to build after electing to do so.

> "It has been settled in this court that in such a case the contract to insure becomes superseded by the building contract, that the action is upon the contract to rebuild, and not upon the policy, and that the company having exercised the option is bound as upon an original contract to build with the consideration paid in advance, and that neither the amount of loss nor the amount of the insurance is controlling upon the question of the amount of the recovery in an action upon such a contract."

Good *vs.* Insurance Co., 43 Ohio, 394.

Lancashive Ins. Co. *vs.* Bornard, 111 Fed., p. 702.

In the latter case it was held that the option to pay damages for an alleged loss, or to rebuild the injured structure secured in policies of insurance may be exercised by the companies at any time after the loss and before the expiration of the time prescribed for its exercise in the policy and having elected, such election is final.

> Fire Association *vs.* Rosenthal, 108 Pa. St., 474.
> Clement Fire Ins., Vol. 1, p. 292.
> Option to Repair, &c., see Rules 9 and 20.
> Smith *vs.* The Glens' Falls Ins. Co., 62 N. Y., p. 85.

In the latter case the declaration set forth the issuing of the policy, the damage by fire, and, after the fire, the agreement that the insured should surrender the policy to be canceled, and the company should pay $——. The policy contained the clause that no action could be maintained thereon unless brought within twelve months, etc. By the court:

> "The answer to the limitation of time provided in the policy for commencing the action is *that the action is not upon the policy, but upon the special agreement.* True, the agreement is founded upon the policy, but the claim for the loss under the policy has been liquidated and changed into a different form, to wit, the promise of the company to pay a specified sum, and this upon a new consideration. Suppose the agreement had been reduced to writing, or a note given for the amount, would the limitation of time for bringing the action upon the policy have applied to these obligations? Clearly not."

So, also, Insurance Company *vs.* Archdeacon, 82 Ill., 236, where it was held that where the loss has been adjusted and the amount agreed upon and the suit is upon the implied promise to pay such amount, *the limitation of one year fixed by the policy has no application.*

Exercise of the option to repair or rebuild operates as a waiver of all known violations or conditions of the policy otherwise making it void. If the company announce it would make good the loss by paying the money all defenses are thereby waived in absence of fraud or mistake. The notice or undertaking to rebuild is an announcement that it would make good the loss in another way than by the payment of money, and is likewise a waiver of all defenses.

We respectfully submit that the demurrer to the third plea should have been sustained.

D. S. MACKALL,
Attorney for Appellant.

In the Court of Appeals

OF THE DISTRICT OF COLUMBIA.

APRIL TERM, 1908.

No. 1878.

LUCIEN D. WINSTON, APPELLANT,

vs.

THE ARLINGTON FIRE INSURANCE COMPANY FOR THE DISTRICT OF COLUMBIA, APPELLEE.

BRIEF FOR APPELLEE.

WM. G. JOHNSON,
Counsel for Appellee.

THE LAW REPORTER PRINTING CO., WASHINGTON, D. C.

In the Court of Appeals

OF THE DISTRICT OF COLUMBIA.

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BRIEF FOR APPELLEE.

WM. G. JOHNSON,
Counsel for Appellee.

THE LAW REPORTER PRINTING CO., WASHINGTON, D. C.

In the Court of Appeals

OF THE DISTRICT OF COLUMBIA.

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THE ARLINGTON FIRE INSURANCE COMPANY FOR THE DISTRICT OF COLUMBIA, APPELLEE.

BRIEF FOR APPELLEE.

Statement.

The appellant, plaintiff in the court below, brought his action at law against the appellee by filing a declaration containing two counts (Rec., pp. 1–3). To this declaration the appellee filed three pleas in bar—the general issue, the Statute of Limitations, and a plea in the nature of an estoppel founded upon a special limitation in the contract (Rec., p. 4).

Upon the first and second plea the appellant joined issue but demurred to the third plea (Rec., pp. 4–5).

The substance of the plea demurred to is that by the terms of the contract of insurance in the declaration alleged the plaintiff stipulated and agreed with the defendant, in consideration of the making of the contract of insurance, that no suit or action on said contract of

insurance for the recovery of any claim shall be sustainable unless commenced within twelve months next after the fire doing damage to the property insured, and that the plaintiff did not bring this action within such twelve months, nor until more than six years after said fire (Rec., p. 4).

The ground of demurrer to this plea is that—

> "the limitation contained in the alleged policy of insurance can not be pleaded to an action not based on the policy" (Rec., p. 5).

This demurrer was overruled (Rec., p. 5). Appellant, however, did not seek to amend, but elected to stand upon his demurrer and judgment was accordingly entered for appellee, from which appellant appealed to this court (Rec., p. 6).

ARGUMENT.

The matter of first importance upon this appeal is to determine what question was presented to and decided by the court below upon this demurrer.

It is respectfully submitted that no question of the rights of the appellant under the contract of insurance or under any subsequent or collateral contract, if any there were arising therefrom, is presented by this demurrer, but that the sole question is one of pleading and must find its solution in the proper interpretation of the language of the demurrer and declaration.

I.

The Grounds of the Demurrer.

The sole ground of the demurrer is that—

> "the limitation contained in the alleged policy of insurance can not be pleaded to *an action not based on the policy*" (Rec., p. 5).

The demurrer itself is defective in that it sets up as a defense an abstract proposition of law, applicable only by way of inference and not by positive statement. But waiving this defect and giving effect to the most favorable inference fairly deducible from it, the demurrer obviously means that this action is "not based upon the policy" and, therefore, the stipulations of the policy are not relevant or admissible in defense.

In other words, that the cause of action stated in the declaration is not a breach of the contract or policy of insurance, but the breach of some other contract.

These considerations logically lead to a careful analysis of the language of the declaration in order to ascertain upon what cause of action, if any, the declaration is based.

The declaration is in trespass on the case, in the assumpsit form, and in order to state a cause of action at all must, by the essential and elementary rules of pleading, allege, in proper form, a promise, a consideration, a breach and damage. An examination of the declaration will show, it is submitted, that this action is based upon the policy and that no other cause of action is stated in that pleading.

The first count, after setting forth that appellant, on the 8th of June, 1901, was the owner of a certain building, the roof of which was damaged by fire, alleges that—

> "at the time of the occurrence of said fire and the damage to said premises by reason thereof said premises were insured in the defendant company against all direct loss or damage by fire in the name of the plaintiff as owner of said premises; that *under the terms of the contract of insurance then existing* between the defendant and the plaintiff, the defendant *had the right, in discharge of its liability under said contract of insurance*, to pay to the plaintiff the amount of the ascertained loss or damage to said premises by

> reason of said fire, *or* at its option *to repair, rebuild or replace the property so lost or damaged* with other of like kind and quality within a reasonable time; that after said fire the defendant, *in pursuance of the terms of said contract or policy of insurance and in consideration thereof*, elected and undertook, promised and agreed to repair, rebuild and replace the said plaintiff's brick warehouse and premises aforesaid, and in this connection to replace and reconstruct the metal roof thereof so destroyed and damaged by said fire" (Rec., p. 2).

This count then proceeds to allege that the appellee proceeded with the work, but did it so negligently and improperly that by April 1, 1907, appellant was compelled to do the work over again at a damage of $382.50.

The substantial allegations of this count are that "under the terms of the contract of insurance" the appellee had the right "in discharge of its liability under said contract of insurance" to do one of two things, namely, either "to pay to the plaintiff the amount of the ascertained loss or damage," "*or* at its option to repair, rebuild, or replace the property so lost or damaged" and that "*in pursuance of the terms of said contract or policy* of insurance and *in consideration thereof*," it undertook to repair.

The contract or promise alleged in this count is the policy of insurance, containing two promises in the alternative, to pay the damage in money or to repair it in labor and material; the consideration is "the terms of said contract or policy of insurance," the breach is the negligent and defective work, and the damage the consequent cost to make it good.

Here is seen to be a complete cause of action, "based on the policy," showing no other basis whatsoever. No element necessary to a complete count in assumpsit is lacking, and the policy of insurance would be an essen-

tial piece of evidence to establish the promise, the breach of which is the foundation of the suit. To say that this count is "not based upon the policy" is to refute the entire count.

A careful examination of this count also shows that it does not contain the elements necessary for the statement of any other cause of action "not based on the policy;" but if it did, this could not help appellant, because the count would then contain *two* causes of action, and as the demurrer to the plea, by the established rules of pleading searches the entire record and goes back to the first fault in the pleadings, it would reach back to the plaintiff's defective count and judgment must have gone against him, even though the plea were bad.

Referring now to the second count, it is seen that after alleging ownership of the premises and damage thereto by fire on June 8, 1901, this count avers that—

> "at the time of said fire, to wit, on the day and year aforesaid *said building was insured under a certain contract or policy of insurance* issued by the defendant for value received, to the plaintiff, whereby and in consideration whereof, the said defendant insured the plaintiff against all direct loss and damage by fire (except as otherwise provided in said policy), to said building; that *under the terms of said contract or policy of insurance* so as aforesaid then existing between the plaintiff and defendant, the defendant *had the right in discharge of its liability thereunder* to the plaintiff, by reason of said fire, *to pay to the plaintiff the amount of the ascertained damage or loss* to said building by reason of said fire, *or* at its option *the right to repair, rebuild or replace the property so lost or damaged,* with other of like kind and quality within a reasonable time thereafter; that after said fire the defendant elected to exercise its right to repair, rebuild or replace the property so lost and damaged, and

thereupon the defendant, *under its said contract or policy of insurance became obligated to repair, rebuild and replace the plaintiff's said building* and the metal roof thereof, so lost and damaged by fire as aforesaid, within a reasonable time thereafter, with other of like kind and quality; and the defendant then and there, *in consideration of the premises and its obligation aforesaid*, undertook and then and there faithfully promised the said plaintiff to repair, rebuild, replace and restore the said building and the metal roof thereof, with other of like kind and quality, and to perform said work with good and proper materials, and in a sound, substantial and workmanlike manner, *according to the true intent and meaning of its said obligation, undertaking, promise and agreement*" (Rec., pp. 2–3).

Here are found substantially the same averments which are found in the first count. The only contract alleged is the policy of insurance, containing an indemnity obligation which could be discharged in alternative ways—by paying the money *or* repairing. There is no claim or suggestion in this count that the obligation to repair arises out of any other contract than the policy of insurance. On the contrary the language used in the pleading expressly bases the obligation to repair on the policy. The language of the count is that the "defendant *under its said contract or policy of insurance* became obligated to repair," etc., and that it undertook to do such repairs "in discharge of its liability thereunder," i. e., under the policy. So when it comes to the allegation of the breach of promise, the sole ground of action, the averment is "yet the said defendant, not regarding its *aforesaid obligation*," etc. (Rec., p. 3), the "aforesaid obligation" being one averred to have arisen "under its said contract or policy of insurance."

It is respectfully submitted that under these pleadings the court could not hold the suit to be "an action not based upon the policy" as set out in the demurrer.

The pleadings containing that basis for the action and no other, the sole ground of demurrer was without support and the demurrer was properly overruled.

II.

Appellant's Contentions and Authorities in Support Thereof.

It is to be noted that, although the demurrer is based upon the sole ground that the action is "not based on the policy," in the brief for appellant, the terms of the declaration are not discussed and no analysis of it is attempted to show that by its terms this action has any other basis than the policy.

The only matter presented to the court below, namely, the nature of the declaration, is entirely ignored in this court, by appellant.

Two grounds for reversal of the judgment seem to be relied upon, to wit: (*a*) That the limitation can not apply because the obligation was to repair "within a *reasonable time,*" and (*b*) because courts have held that under certain policies or under particular circumstances the undertaking to rebuild constituted a new contract to which the terms of the policy did not apply.

(*a.*)

The provision as to "reasonable time" is alleged, in both counts of the declaration (Rec., pp. 2 and 3) to be a part of the terms of the policy itself. But if the action is "not based on the policy" then this provision in the policy can not be relied upon to support the demurrer.

Furthermore the declaration does not allege what was a "reasonable time," nor that such "reasonable time" had not elapsed before the expiration of twelve months next after the fire. Any omission or uncertainty in the

pleadings must be resolved against the pleader, and it must be assumed that the repairs were completed, and the breach, if any, in respect thereto, occurred after such reasonable time and within such twelve months.

But this question, if it could properly arise in the case, is manifestly one of fact and not of law and could only be properly raised either by joining issue on the plea or by a replication in confession and avoidance to the plea, setting out that a reasonable time had not elapsed until after expiration of the twelve months, a traversable fact which defendant would have had the right to have tried by the jury.

Certain it is that the demurrer to the plea could not supply the omission in the declaration of this averment of fact.

(*b.*)

The authorities cited in brief for appellant, it is submitted, are wholly irrelevant to this case.

None of the cases cited refers to any principle of pleading, but all concern the rights of insurer and insured in cases decided after trial of the facts, where the policy itself was before the court and all the material facts had been found by the court or verdict of the jury.

The case of Morrell *vs.* Irving Fire Insurance Co., 33 N. Y., 429, was a review of the second trial after the case had been reversed on a former judgment.

In this case the company undertook to rebuild. The insured insisted that the work was not completed and commenced a suit on the policy claiming the full amount of the pecuniary indemnity, notwithstanding the admitted partial restoration of the building. The insured recovered a verdict and judgment for that amount which was affirmed by the general term, but reversed by the Court of Appeals on the ground that the election to rebuild formed a new

contract, which could be enforced as a building contract without reference to the amount named in the policy. The principle of the case will be found in the opinions rendered on reversing the first judgment (pp. 447–60).

In the case of Beal's exr. *vs.* Home Insurance Co., 36 N. Y., 522, immediately after the fire the insured proceeded to erect a new building of a different kind without giving the company an opportunity to rebuild. Within thirty days the company gave notice that they would rebuild, but the owner refused to permit them. The plaintiff undertook to enforce the policy for the full amount of the money loss and this, it was held, he could not do. The real question in the case was whether the insured, by proceeding immediately with the erection of a new structure could thereby deprive the company of the right reserved in the policy to restore rather than to pay money damages for the loss.

In the case of Smith *vs.* The Glens' Falls Ins. Co., 62 N. Y., 85, the company agreed to pay $1,258 in settlement of the claim if the insured would surrender up the policy for cancellation. The insured gave up his policy, but the company did not pay and the insured brought suit and obtained judgment for the amount agreed to be paid. The company pleaded the limitation of time in the policy, but the court denied this defense saying (p. 86):

> "According to the facts thus found, the *action is upon a special contract made subsequent to the loss* by which the defendant *agreed to pay a specified sum in* consideration that the assured would cancel the policy which he did. . . . The answer to the limitation of time provided in the policy for commencing action is, that the action is not upon the policy, *but upon the special agreement.* True, the agreement is founded upon the policy, but the claim for the loss under the policy has been liquidated and changed into a different form, to wit, *the promise of the company to pay*

> *a specified sum*, and this *upon a new consideration*. Suppose the agreement had been reduced to writing, or a note given for the amount, would the limitation of time for bringing the action upon the policy have applied to these obligations? Clearly not. The circumstance that the new contract rested in parol does not affect this question."

In the case of Heilman *vs.* Insurance Co., 75 N. Y., p. 7, the policy contained an option to the company to rebuild. The company notified the plaintiff that it would rebuild, which offer the plaintiff accepted, but the company neglected and refused to rebuild. The only question in the case was whether the party bringing the suit had the right to recover, or whether the suit should have been brought by the mortgagee.

It was conceded by the company that if Heilman was entitled to bring the action instead of the mortgagee judgment should be for the plaintiff.

In the case of Wynkoop *vs.* Niagara Fire Insurance Co., 91 N. Y., 478, the policy contained the clause that—

> "in case differences shall arise touching any *loss or damage*, after proof thereof has been received in due form, the matter shall, at the written request of either party, be submitted to impartial arbitrators."

The property was damaged by lightning and the company undertook to rebuild. Controversy arose as to the sufficiency of the repairs and finally suit was brought on the policy. The company insisted that the arbitration clause applied and that no suit could be brought. The court held that the arbitration clause applied only to the case where the loss was to be indemnified in money damages and not to the case where the company undertook to rebuild.

The arbitration clause plainly referred to controversies

as to the amount of damage resulting from the fire and not to controversies relating to the manner of rebuilding or restoration should the company undertake the latter mode of discharge.

In the case of Insurance Co. *vs.* Archdeacon, 82 Ill., 236, the company agreed to pay a certain sum in liquidation of the damage and afterwards failed to pay it.

In this case the court held that the adjustment and agreement to pay constituted a new contract. The suit was upon that new promise and not upon the policy and was not affected by any clause in the policy. That the company by its act of adjusting the loss and endorsing it on the policy had waived all rights under the policy and made a new promise to pay the amount stated, which could be recovered under the common counts without reference to the policy.

Thus it is clear that these cases cited in brief for appellant all relate to a state of facts entirely different from those set out in the case at bar.

Whether the terms of the policy here involved, but which are not set out in the record and the facts of this case, would have justified a suit, as upon a building contract, can not be determined upon this record.

But the record does show that the present action is not brought upon any such independent or collateral contract but is based upon the policy.

The appellant has been deprived of no right and suffered no surprise. If the facts justified a suit upon an independent building contract instead of on the policy, the appellant should have taken leave to amend, but, instead, he formally elected to stand upon the demurrer and the judgment overruling it is clearly right and should be affirmed.

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